Workplace Safety and Insurance Appeals Tribunal

QUARTERLY REPORT

Production and Activity

For the Period
April 1st through June 30th, 2004

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The Quarterly Report

Key Tribunal Activities

A) Tribunal Production

Productivity in Relation to Case Management Objectives

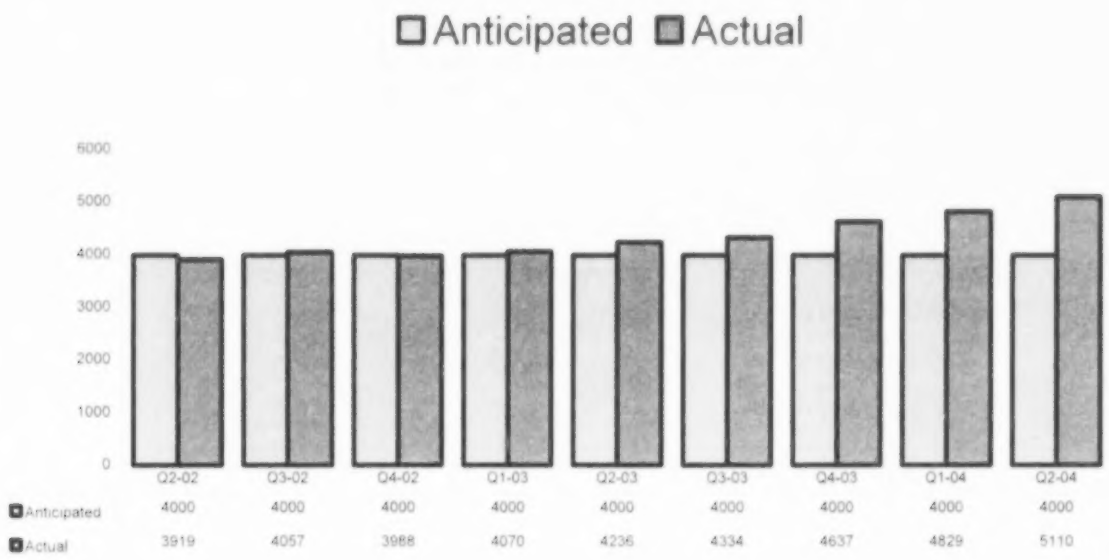


Figure 1. Appeals Inventory, Anticipated vs. Actual

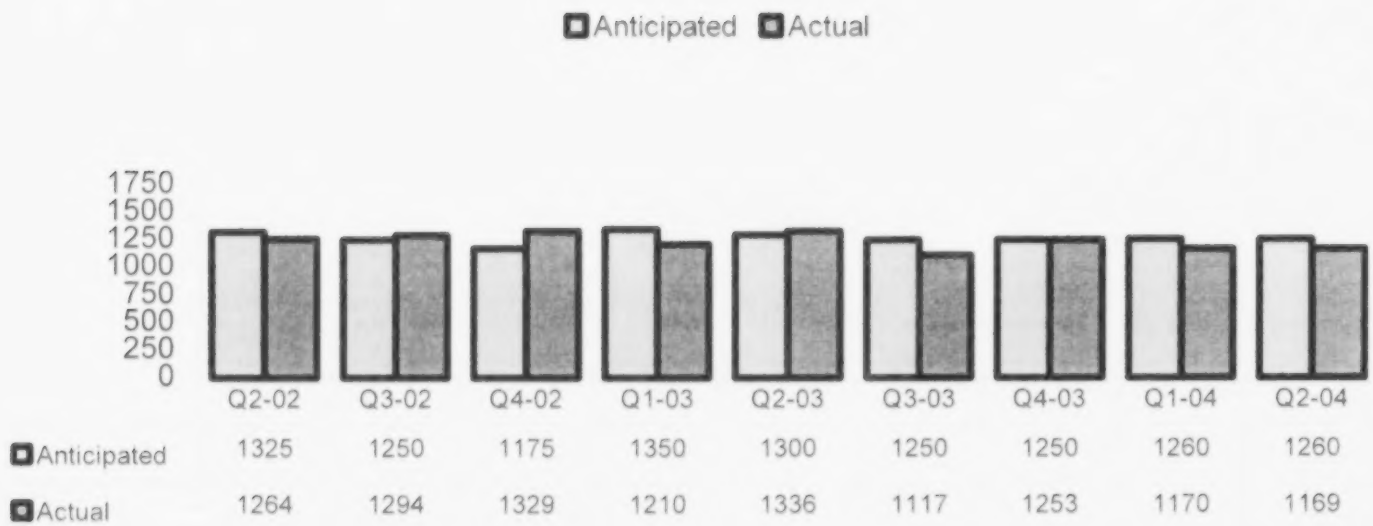


Figure 2. Incoming Appeals. Anticipated vs. Actual

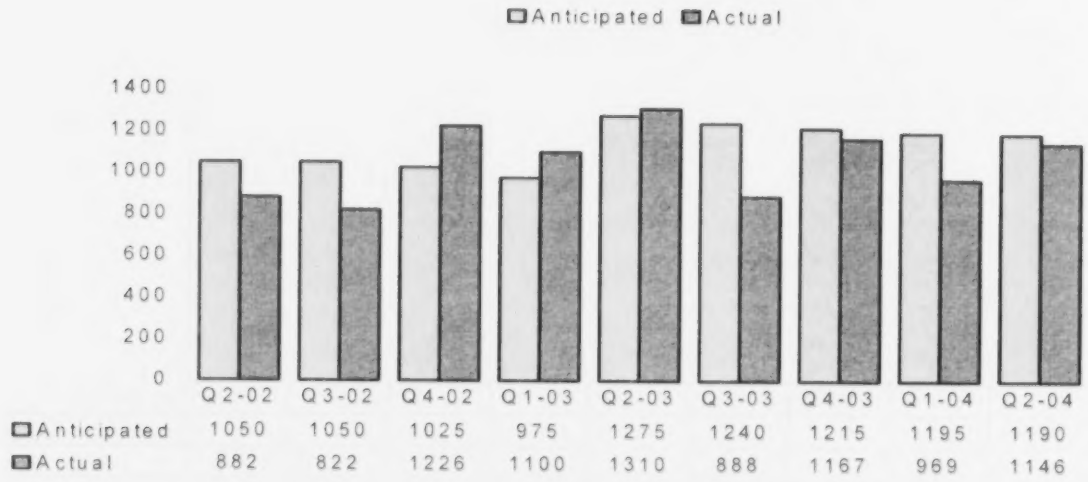


Figure 3. Dispositions, Anticipated vs. Actual

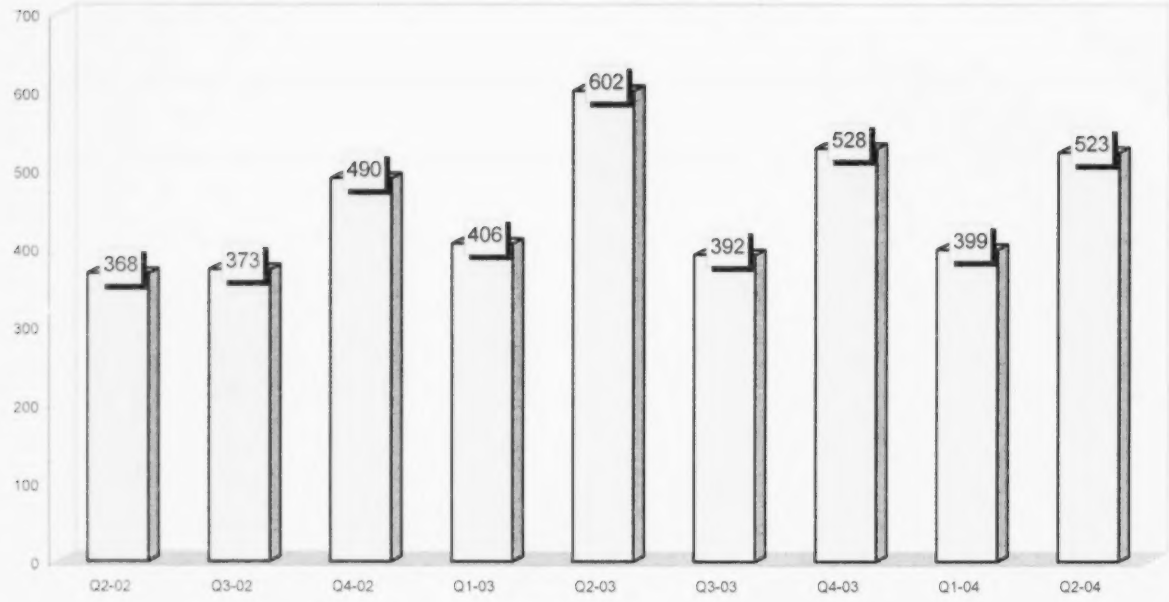


Figure 4. Dispositions from Pre-Hearing processes

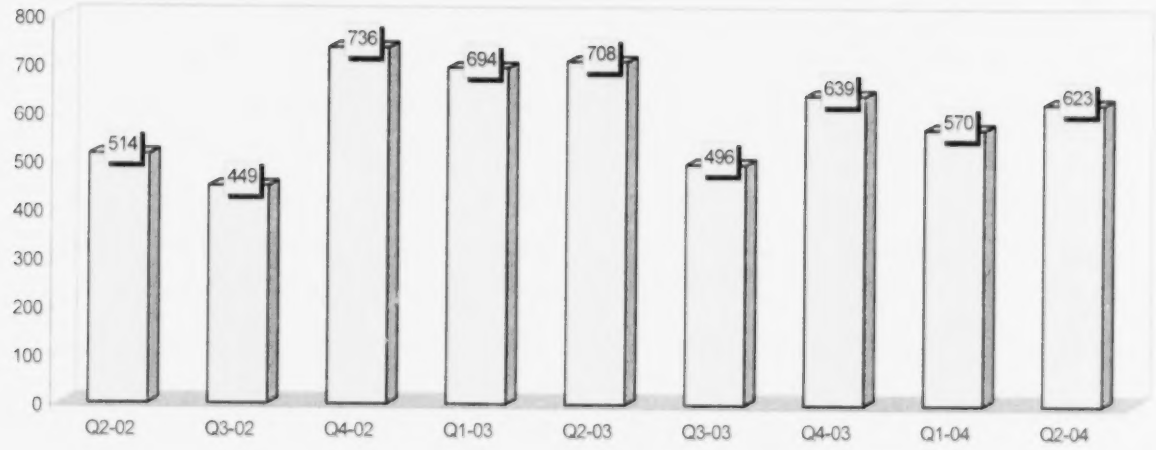


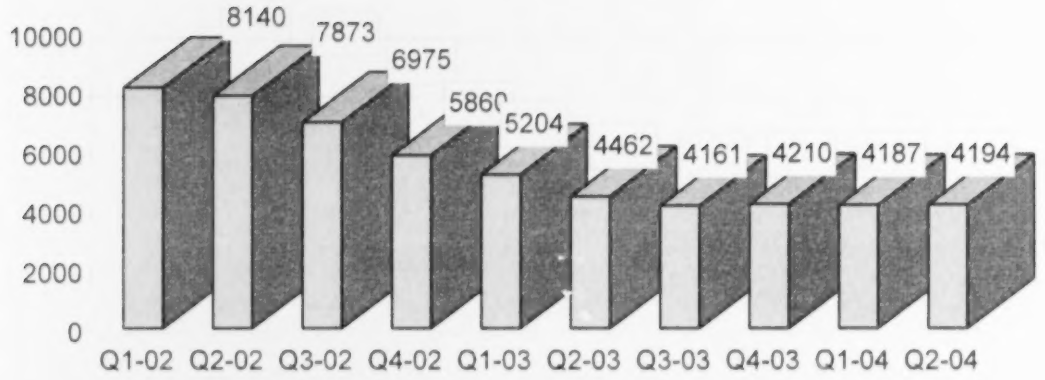
Figure 5. Dispositions from After Hearing processes.

Inactive Inventory. At the close of the second quarter 2004, the Tribunal's inactive inventory numbered 4,194, an increase of 7 cases from the previous quarter.

During the second quarter, 194 appellants contacted the Tribunal to continue or re-activate their appeal, representing just 4% of the previous quarter's inactive inventory of 4,187. In the second quarter of 2004, deactivations numbered 213 cases. These figures, in addition to file closures through the inactive inventory reduction project, resulted in a net inactive inventory increase of 7 cases.

During this quarter, 39 of the above-noted reactivations involved cases in the inactive inventory reduction project. Reactivations are taken into account in the Tribunal's business planning, and expected reactivations are included in projections as incoming appeals.

Inactive status was created in 1997 as a case management approach to provide appellants with time to prepare their appeal prior to hearing. This process is subject to the Tribunal's Practice Direction on Inactive Files.



Inactive Inventory Q1 2002 to Q2 2004

B) Communications

C) Judicial Review Activity

The Tribunal dismissed the appeal, and confirmed the worker had chronic pain. In coming to this finding, the Panel discussed the worker had not yet heard once at the time of her accident.

The worker then requested the Tribunal reconsider the finding in *Decision 770/98I* that she had an organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision 770/98R*, the Panel denied the reconsideration, and confirmed the worker did not have TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

The worker applied for judicial review of the decision that she did not have an organic condition.

The judicial review was heard in Divisional Court on April 19. The Court found the Tribunal's decision was patently unreasonable. The Divisional Court's decision, which is not long, focused on two paragraphs of the reconsideration decision. The Court was not satisfied with the way the Panel had dealt with the co-worker's affidavit on the reconsideration in regards to the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had also not satisfactorily dealt with the conflict in the medical evidence.

The Tribunal filed a notice of motion for leave to appeal the Divisional Court decision. At the end of the quarter, the Tribunal was aware of the worker's responding leave factum.

3. **Decisions Nos. 28/02 (February 11, 2002) and 28/02R (July 22, 2003)**

Decision No. 28/02 found, applying the statutory benefit of doubt in favour of the worker, that a hospital worker had sustained a concussion. The worker had a late federation, and the Panel found on the evidence that it arose as a result of a fall on her way to a demonstration. The employer's application for judicial review of the decision was supported on consent of the parties, to permit the employer to pursue a reconsideration application at the Tribunal.

Decision No. 28/02R denied the application for reconsideration. The employer then elected to proceed with the judicial review. The judicial review was heard on June 10 in Ottawa.

The Divisional Court unanimously dismissed the application for judicial review. The Court found that the Tribunal was entitled to weigh the evidence and apply the benefit of doubt. The Tribunal's decision to reconsider, and the Tribunal's decision was not patently unreasonable.

4. **Decisions Nos. 1818/98 (March 22, 1999) and 1818/98 (October 27, 1999)**

Decisions Nos. 1818/98 and 1818/98 were released in 1999. Fifteen years later, in 2014, the worker brought an application for judicial review of the decisions.

The worker alleged the WSIB had improperly released his claim file to the employer. The worker argued that because of this WSIB action the Tribunal had lost jurisdiction to hear his appeal. The Tribunal did not agree, and held it had jurisdiction.

The worker brought a motion to add the WSIB and the employer as parties to the application, which the Tribunal did not oppose. The worker also alleged the Tribunal was refusing to disclose information in his case, and this part of the motion was dismissed.

The worker has added nine "Constitutional Questions" which he wants the Divisional Court to address. The WSIB has counsel (Lorne) who has stated an intention to bring a motion to quash the application for judicial review. All the court file quarter the WSIB was attempting to set a date for the motion convenient to all parties.

5. **Decision No. 609/95 (June 23, 1997)**

This application for judicial review of Decision No. 609/95 is with counsel for the Tribunal (Ida) in DRC. It appears to be common ground between medical experts in allowing entitlement for a worker. Just prior to the end of the quarter, counsel for the worker began to raise procedural inconsistencies. The Tribunal will now be preparing its record.

6. **Decision Nos. 433/99 (June 24, 1999) and 433/99R (May 30, 2000)**

Counsel for the worker served the Tribunal with an application for judicial review of Decision Nos. 433/99 and 433/99R. These decisions found that a worker's low back disability was not caused by a 1979 work injury. There has been no further activity on the application for some time. However, counsel for the worker participated in the case at the Tribunal hearing, and it now appears that the judicial review application will be moving forward.

7. **Decision Nos. 3536/00E (January 8, 2001), 3536/00ER (August 14, 2001), and 3536/00ER2 (May 5, 2003)**

The worker's former representative failed to file an appeal to the Tribunal within the time set out in the WSIA. The worker applied to extend the time that his appeal was filed. Two applications to reconsider the original time limit decision were denied.

The worker commenced an application for judicial review. Both the worker and Tribunal have filed their materials. At the end of the quarter, both parties were awaiting a date to be set for the judicial review.

8. **Decision No. 1164/03 (December 30, 2003)**

This application for judicial review was filed immediately before work-to-rule started at the Tribunal during this quarter. In Decision 1164/03 the Panel denied entitlement to the worker. The Panel ordered the worker to repay the employer as a requirement of the application. At the end of the quarter the counsel was still trying to obtain the transcripts.

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D) Highlights of Decided Cases

The Panel concluded that neither the legislation nor the policy was inconsistent with s 15. They were persuaded that s 45 (4) resulted in differential treatment between injured workers with pensions of more or less than 10%. For the sake of argument, the Panel accepted that the differential treatment was based on an enumerated ground in s. 15 of the Charter. The Panel then considered whether there was substantive discrimination that demeaned essential human dignity. The worker argued s 45 (4) resulted in a stereotypical assessment of disabled workers as being unable to manage their own financial affairs. The worker was in essence challenging the underlying principle that workers' compensation benefits are to be paid on a periodic basis.

The Panel found these arguments unpersuasive due to the significant historical and widespread support in Canada for the importance of periodic wage replacement in compensation and other benefit systems. Section 45(4) does not impose restrictions on account of unjustly ascribed characteristics. Instead, it accommodates and protects the interests of disabled workers as it is based on the reasonable premise that the compensation scheme should mirror the income system it replaces. Lifetime access to periodic benefits is a notable source of security and of valuable economic right. Section 45(4) does not limit the right to benefits, but only directs the manner in which they are to be paid. Section 24 is a further indication that the legislation meets the needs of permanently disabled workers because it gives the Board the discretion to continue benefits, thus recognizing that there may be individual circumstances when periodic benefits are not appropriate. The Panel concluded that s 45 (4) does not demean permanently disabled workers and does not indicate that they are not equally valued as members of Canadian society. The Panel also concluded that the Board policy on commutations, which requires a rehabilitative purpose, was entirely consistent with the purpose of the compensation scheme and not discriminatory. Finally, the Panel held that s 45 (4)'s allowance of commutations of pensions of 10% or less, virtually as a right indicated that the Legislature recognized that it would be more efficient administratively to pay minimal pensions in a lump sum.

Effect of Policy Changes: Decision No. 1928/03 addresses whether a party can relitigate a matter already litigated at the Tribunal if the Board subsequently releases a new policy with a new interpretation of the Act concerning the subject matter in issue. The case involved a claim for an item that the worker had previously appealed to the Tribunal. After receiving a number of decisions considering evidentiary issues, the Tribunal permitted the worker to withdraw her original appeal with prejudice. When she later attempted to reactivate that appeal at the Tribunal, the Tribunal held she could bring her appeal anew, subject to the time limits. A transitional extension was not granted in all the circumstances. Subsequently, the Board approved a new policy for strain claims and the worker brought a new claim under the new policy. The Review Assessment Officer held that the Board had jurisdiction to hear the appeal as there was no decision under the new policy, but ultimately dismissed the claim. When the worker appealed the Board's decision under the new policy to the Tribunal, the Tribunal held that a final decision had already been made. The concepts of *res judicata* and *issue estoppel* applied, and that the Board erred in considering a new application and a new appeal. In reaching its decision, the Tribunal relied on a Supreme Court of Canada case that held that a new legal argument or a change in circumstances cannot be grounds for reopening a prior decision. However, the worker was not barred from bringing a reconsideration request concerning the Tribunal's earlier decisions.

Employer Issues: In Decision No 2341/03, when the employer cancelled its voluntary coverage under Schedule 1, the Board assessed a departure fee. This is a supplementary premium for the final year of coverage that is intended to ensure that all remaining financial obligations of the employer are met, including the employer's share of the unfunded liability for the class. The employer later reactivated its voluntary coverage and contested the assessment of the departure fee. Prior decisions have held that while the Tribunal does not have jurisdiction to consider the appropriateness of the departure fee scheme, it has jurisdiction to consider how the scheme was applied to a particular employer, and whether there were exceptional circumstances warranting a variation in the Board's usual approach. The Panel found exceptional circumstances existed

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